Supreme Court, U.S.
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No. 92-1013

In The

Supreme Court of the United States

October Term, 1992

ADAM FREDERICK CHAPMAN,

Petitioner,

vs.

POWERMATIC, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner timely filed his Petition for Writ of Certiorari with this Court.

2. Whether this Court should exercise its power to review the decision of the United States Court of Appeals for the Fifth Circuit.

3. Whether the court of appeals erred in holding that the original pleading in this case which did not state an amount in controversy in excess of $50,000 was not removable.

4. Whether the court of appeals erred in holding that the medical bills and demand letter received by Powermatic did not begin the running of the thirty-day time period for removal since Powermatic received them prior to receiving the initial pleading.

5. Whether this Court should overturn the Fifth Circuit's finding that the case was not removable until Plaintiff served its interrogatory answers stating, for the first time, the amount and nature of damages he was seeking in this case.

6. Whether the district court abused its discretion in finding that Powermatic's Notice of Removal was timely and exercising diversity jurisdiction.

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JURISDICTION

The Court of Appeals for the Fifth Circuit issued its decision on August 26, 1992. Petitioner filed a Suggestion for Rehearing In Banc under Rule 35(b) of the Federal Rules of Appellate Procedure. Petitioner did not file a petition for rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Petitioner filed the present Petition for Writ of Certiorari more than ninety days after the August 26, 1992 judgment of the Fifth Circuit. The Petition for Writ of Certiorari is therefore untimely and this

Court lacks jurisdiction. 28 U.S.C. § 2101(c). Sup. Ct. R. 13.4.

STATEMENT OF THE CASE

Plaintiff's Original Petition was filed in state court on June 28, 1990, and served on the Secretary of State of Texas on July 10, 1990. Powermatic filed its Original Answer on July 26, 1990. Plaintiff's Original Petition failed to state the amount of damages he was seeking. Powermatic served its first set of interrogatories on Plaintiff on August 3, 1990, requesting, among other things, that Plaintiff specify the dollar amount of the damages sought. Plaintiff served his answers to interrogatories on August 17, 1990, claiming, for the first time, in excess of $800,000 in damages. Powermatic filed its Notice of Removal on August 27, 1990 (well within thirty days after August 17, 1990) in reliance on the provisions of 28 U.S.C. § 1446(b). The United States District Court for the Northern District of Texas denied Plaintiff's Motion to Remand and found that the case was timely removed because Powermatic removed the case within thirty days after receiving the answers to interrogatories stating that the amount in controversy was over $50,000. The district court specifically found that the interrogatories, for the first time, stated that the amount in controversy was over $50,000. The case proceeded to trial on the merits and the jury found in favor of Powermatic. There is no suggestion that Plaintiff did not receive a full and fair trial on the merits. Plaintiff appealed to the Court of Appeals for the

Fifth Circuit on the sole procedural issue of whether Powermatic timely filed its Notice of Removal.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY

The Court of Appeals for the Fifth Circuit entered its judgment on August 26, 1992. Petitioner filed a Suggestion for Rehearing In Banc under Rule 35 of the Federal Rules of Appellate Procedure. Petitioner did not file a petition for rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 2101(c) a petition for writ of certiorari must be filed within ninety days after the entry of the judgment of the court of appeals. Rule 13.4 extends the time for filing **if a petition for rehearing is timely filed** in the court of appeals. Sup. Ct. R. 13.4. A suggestion for rehearing in banc under Rule 35(b) is not a petition for rehearing. *Missouri v. Jenkins*, 495 U.S. 33, 46 (1980). Although the order on the suggestion for rehearing states that the Fifth Circuit is treating the suggestion for rehearing as a petition for panel rehearing, Petitioner did not **file** a petition for rehearing to extend the time for filing a petition for writ of certiorari as is expressly required by Rule 13.4. Sup. Ct. R. 13.4. Thus, the present Petition for Writ of Certiorari filed on December 14, 1992, 110 days after the August 26, 1992 judgment, is untimely. Therefore, this Court lacks jurisdiction under 28 U.S.C. § 2101(c).

II. THE DISTRICT COURT HAD DIVERSITY JURISDICTION AND THE PLAINTIFF RECEIVED A FULL AND FAIR TRIAL ON THE MERITS

The Plaintiff received a full and fair trial on the merits in the United States District Court for the Northern District of Texas. There is no question that the district court had diversity jurisdiction in this case. Plaintiff complains solely of the procedural issue involving the district court's finding that Powermatic timely removed the case to federal court. Plaintiff is not complaining of any other error in the trial court; he is merely seeking a second bite at the apple in state court.

This case presents none of the special and important reasons for granting a writ of certiorari. Sup. Ct. R. 10. The Fifth Circuit's opinion below is not contrary to any decision of this Court or any court of appeals. The thirty-day time limit for removal under 28 U.S.C. § 1446(b) is a procedural requirement which is not jurisdictional. *Leininger v. Leininger,* 705 F.2d 727, 729 (5th Cir. 1983); *Financial Timing Publications, Inc. v. Compugraphics Corp.,* 893 F.2d 936, 940 (8th Cir. 1990). Once the district court has made the determination that the removal was timely, and given the parties a full and complete trial on the merits, then only in the rarest of cases should the appellate court undo all of this by remanding the case. It would be an unnecessary hardship to subject a party who prevailed in the district court to a reversal of the judgment, not because of an error in the trial, but because of a disputed question of removal. *See Mission Pacific Co. v. Fitzgerald,* 160 U.S. 556, 583 (1896). Even assuming there is some question as to the interpretation of the removal

statute, this is a matter that should be left to the discretion of the district courts. Thus, there are no special and important reasons for granting the writ of certiorari.

III. THE ISSUES PRESENTED IN THIS CASE ARE PROPERLY LEFT TO THE DISCRETION OF THE DISTRICT COURTS

Where, as here, the procedure or requirement does not affect the court's "power" (jurisdiction) to hear the case, the court's decision to exercise removal jurisdiction is reviewed under the abuse of discretion standard. *Pope v. MCI Telecommunications Corp.*, at 937 F.2d 258, 262 (5th Cir. 1991), *cert. denied*, ___ U.S. ___ (1992); *Financial Timing Publications, Inc. v. Compugraphics Corp.*, 893 F.2d 936, 940 (8th Cir. 1990). Each party had the opportunity to, and did, present factual and legal arguments to the district court as to the timeliness of the removal in this case. The district court **found** that Powermatic removed the case within thirty days after it first became removable – "30 days from the time it received answers to interrogatories stating that the amount in controversy was over $50,000." *Chapman v. Powermatic*, 969 F.2d 160, 161 (5th Cir. 1992) (quoting the district court's order). The court also **found** that the "case was timely removed pursuant to 28 U.S.C. § 1446(b)." *Id.* The district court's findings and its reliance on the express language of the statute afforded a reasonable basis for its decision, and no abuse of discretion occurred. The district court assumed jurisdiction over the case and proceeded to a full trial on the merits; no policy would be served by this Court remanding the case.

IV. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY INTERPRETED 28 U.S.C. § 1446(b)

A. The Case Stated by Plaintiff's Original Petition Was Not Removable.

Section 1446(b) provides that "[i]f the **case stated by the initial pleadings** is not removable, a notice of removal may be filed within thirty (30) days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable. . . . " 28 U.S.C. § 1446(b). Plaintiff's Original Petition did not request a specific amount of damages, but rather stated that Plaintiff had "suffered damages in excess of the minimum jurisdictional limits of this Court." The minimum jurisdictional limit of the district court of Dallas County, Texas, $500, is obviously less than the $50,000 minimum jurisdictional amount in controversy necessary for diversity. Thus, the "case stated by the initial pleading" was not removable.

The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in good faith. *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353, *reh'g denied*, 368 U.S. 870 (1961). This is entirely consistent with § 1446(b) which mandates that removability be determined **by the initial pleading.** The court should not affix jurisdiction by "prophesying" what the parties might plead. 367 U.S. at 356. "The cause of action is the

subject matter of the controversy, and that is, for all purposes of this suit, whatever the Plaintiff declares it to be in his pleadings." *Powers v. Chesapeake and Ohio Railroad Co.*, 169 U.S. 92, 97 (1898). The *Powers* case, decided almost 100 years ago, sets forth the longstanding rule that it is the record of the Court which determines removability. *Powers*, 169 U.S. at 101. So long as there does not appear of record to be any removable controversy, the defendant is not required to remove the case. *Powers*, 169, U.S. at 100. Once the jurisdictional facts appear of record, the case becomes removable. *Powers*, 169 U.S. at 102. Since the "case stated" in the Original Petition in this case did not exceed $50,000, Powermatic's Notice of Removal was not appropriate until it received an "other paper" stating the amount in controversy.

B. Plaintiff's Interrogatory Answers Were An "Other Paper" Within the Meaning of § 1446(b).

Section 1446(b) states that the defendant has thirty days to remove after receipt of a copy of "an amended pleading, motion, order, or other paper. . . . " 28 U.S.C. § 1446(b). Plaintiff cannot contend that the letters or other correspondence to Powermatic before the suit was filed constituted "an amended pleading, motion, [or] order." Further, such letters and correspondence would not constitute an "other paper" within the meaning of the statute. The Fifth Circuit correctly held that the plain language of the statute refers to papers received after the initial pleading. *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992). Both the Fifth Circuit and the district court found that the interrogatory answer alleging

$800,000 in damages triggered the thirty-day time period for removal and that Powermatic timely filed its Notice of Removal.

V. MISSTATEMENTS IN THE PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit opinion does not require a plaintiff to plead the federal jurisdictional amount. The Fifth Circuit and the district court merely found that Plaintiff's pleadings, which claimed no specific amount of damages, did not state a case which was removable. If a Plaintiff wishes to trigger the time period for removal, he can amend his pleadings or serve another paper after a suit is filed. The defendant can determine removability by serving interrogatories.

The Fifth Circuit opinion is not contrary to Texas law. Tex. R. Civ. P. 47(b) does not prohibit pleading a specific dollar amount. Petitioner has cited no authority for this proposition; none exists. Rule 47 merely sets forth the minimum requirements for pleading. Cases interpreting this rule hold that a plaintiff is not required to plead a specific dollar amount, not that he is prohibited from doing so. *Young v. Kirsch,* 814 S.W.2d 77 (Tex. App. – San Antonio 1991, no writ). Nothing in the rule prohibits pleading a specific dollar amount.

The Fifth Circuit opinion is not contrary to the policy of restricting removal jurisdiction. The decision does not seek to expand diversity jurisdiction. To the contrary, the court sends a strong message to defendants in the habit of making "knee-jerk" removals. Plaintiff's proposed rule would allow lawsuits with no apparent foundation for

the exercise of federal jurisdiction to be prematurely removed. Plaintiff seeks to penalize Powermatic for seeking to ascertain through interrogatories the amount of Plaintiff's damages instead of instantly removing the case. Instead of immediately removing the case, Powermatic established the amount in controversy and then promptly removed the case. Powermatic should not be penalized for following the **express language** of the statute.

Petitioner argues that this Court must announce a new "bright line" rule, and then urges a rule which contains no bright line and which is inconsistent with the statute. The Fifth Circuit chose to track the language of § 1446(b), and to determine removability from the face of the pleadings. *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992). Petitioner, on the other hand, would require a subjective inquiry into the state of mind of the removing defendant, based upon evidence outside the record.

CONCLUSION

For the foregoing reasons, Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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